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No. 92-1043

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CRITICAL MASS ENERGY PROJECT,
Petitioner,

v.

NUCLEAR REGULATORY COMMISSION

and

INSTITUTE OF NUCLEAR POWER OPERATIONS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENT INSTITUTE OF NUCLEAR POWER OPERATIONS

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QUESTIONS PRESENTED

1. Are confidential reports on events at commercial nuclear power plants exempt from public release under Exemption 4 of the Freedom of Information Act, when the reports are given to the Nuclear Regulatory Commission voluntarily?

2. Was summary judgment for Respondents appropriate under Fed. R. Civ. P. 56 and this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), where Petitioner failed to controvert the extensive, detailed evidentiary record created by Respondents in support of their motions for summary judgment?

RULE 29.1 STATEMENT

Respondent Institute of Nuclear Power Operations is a non-stock, non-profit corporation organized under the laws of Delaware. It has no parent or subsidiary company.

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JURISDICTION

Petitioner Critical Mass Energy Project ("Critical Mass") invokes the jurisdiction of this Court under 28 U.S.C.A. sec. 1254(1) (West 1966 & Supp. 1992). The judgment of the Court of Appeals on rehearing *en banc* was entered on August 21, 1992. On October 7, 1992, the

Chief Justice granted the request of Critical Mass for an extension of time within which to file a petition for certiorari until December 19, 1992. On January 15, 1993, the Court granted the request of the United States for an extension of time within which to respond to the Petition until February 19, 1993.

RULE OF PROCEDURE

Federal Rule of Civil Procedure 56(e) provides in relevant part as follows:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

STATEMENT OF THE CASE

Because Petitioner's Statement of the Case is inaccurate in several respects and contains various assertions that are not supported by the record, and also because the legal issue here is highly fact-bound, Respondent Institute of Nuclear Power Operations ("INPO") submits the following Statement of the Case:

1. *INPO And The "SEE-IN" Reports*

INPO is a Delaware non-profit, non-stock corporation with its only place of business in Atlanta, Georgia. It was organized by the commercial nuclear electric utility industry in 1979 following the accident at Three Mile Island. The sole mission of INPO since its formation has been to promote the highest levels of safety and reliability —to promote excellence—in the operation of commercial nuclear power plants. INPO has no other function. In particular, INPO does not engage in public relations, lobbying, or litigation to promote nuclear power. J.A. 166

(Exhibit A to Affidavit of Angelina S. Howard, Vice President of INPO ("Howard Affidavit")).[1]

The Members of INPO are all electric utilities and other organizations that have direct responsibility and legal authority to operate commercial nuclear power plants in the United States. *Id.* at 159. Membership in INPO is voluntary. The companies that constructed the nuclear steam supply systems used in commercial nuclear plants, and other companies with major responsibility for the design and construction of these plants, are Supplier Participants in INPO. *Id.* at 164.

To carry out its mission of promoting safety and reliability, INPO administers several major programs, which are described at J.A. 162-217. One of those programs is known by the acronym "SEE-IN," which stands for "Significant Event Evaluation & Information Network." SEE-IN was designed to help correct one of the root causes of the accident at Three Mile Island, which was the absence of any system to communicate the lessons learned from significant events at any one nuclear plant to all of INPO's Members.[2]

The SEE-IN program functions through teams of engineers and other technical specialists at INPO, who collect operating experience information from all commercial nuclear power plants, both in the United States and

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[1] In this Brief in Opposition, citations to "J.A." refer to the Joint Appendix filed in the Court of Appeals on rehearing *en banc*.

[2] President Carter's Commission on the Accident at Three Mile Island (usually known as the Kemeny Commission) recommended that the industry establish "a systematic gathering, review, and analysis of operating experience at all nuclear power plants coupled with an industry-wide international communications network to facilitate the speedy flow of this information to affected parties." President's Commission on the Accident at Three Mile Island, *The Need For Change: The Legacy of TMI* at 68 (1979). Although SEE-IN was not a direct response to the Kemeny Commission recommendation, it is consistent with it.

abroad and analyze that information with a view to learning lessons important for the safe operation of those plants. These lessons learned are then communicated back to the men and women who operate the plants through a computerized worldwide communications network. J.A. 279-80 (Affidavit of Terence J. Sullivan, Vice President of INPO ("Sullivan Affidavit")); J.A. 150 (Howard Affidavit).

SEE-IN focuses on "significant events" in plant operations—that is, events that are significant because they offer lessons that can be learned to improve safety and reliability in the commercial generation of electricity through the application of nuclear power. J.A. 361-62 (Supplemental Affidavit of Terence J. Sullivan ("Sullivan Supp. Affidavit")); J.A. 149-50 (Howard Affidavit). In the early 1980s, INPO prepared two principal types of SEE-IN reports that are at issue in this case: Significant Event Reports ("SERs") dealt with a single significant event at a single nuclear power unit. Significant Operating Experience Reports ("SOERs") dealt with similar events, usually at several nuclear power units, which INPO concluded shared a common theme or offered similar lessons for plant safety and reliability. J.A. 280 (Sullivan Affidavit); J.A. 360-61 (Sullivan Supp. Affidavit). The SOERs contain recommendations for corrective action to be taken at nuclear plants, if appropriate. J.A. 188-89 (Howard Affidavit).

INPO carefully controls the distribution of SEE-IN reports pursuant to a formal, written policy statement. J.A. 151, 224-30 (Howard Affidavit). The SEE-IN reports at issue in this case were distributed to the Members and Supplier Participants in INPO, certain International Participants in INPO, the Nuclear Safety Analysis Center (another industry safety organization), and one captive nuclear insurance carrier owned by utilities. *Id.* at 151. These parties receive the SEE-IN reports on the explicit understanding that the reports would

be held in strict confidence. *Id.* INPO permits its Members to disclose a SEE-IN report to an outside party with whom the Member has engaged to assist in responding to the report. Finally, where a SEE-IN report discusses a product, INPO offers the vendor of that product an opportunity to review and comment on a draft of the report. *Id.*; Pet. App. 45a n.12.[3] Critical Mass states, without citation to the record, that SEE-IN reports are "shared with everyone in the nuclear industry." Petition 4. This claim is incorrect.

2. *The Voluntary Submission Of The SEE-IN Reports To The NRC*

At each stage of this lawsuit since 1988, when INPO first became a party, INPO has vigorously asserted that the SEE-IN reports at issue here were given voluntarily to the NRC and should for that reason be exempt from disclosure. Statement of Material Facts in Support of Motion of Summary Judgment of INPO at 13 (D.D.C. Oct. 18, 1988); Brief of Appellee INPO at 11 (D.C. Cir., Feb. 8, 1991); *En Banc* Brief of Appellee INPO at 21 (D.C. Cir., Nov. 13, 1991). The statements to the contrary in the Petition are incorrect. Petition 9, 13-14.

INPO is not licensed or regulated by the NRC. INPO does not prepare SEE-IN reports to comply with any NRC regulation. INPO has no formal agreements with its Members that obligate them to provide INPO with information on significant events or to make the personnel in their commercial nuclear plants available for interviews by INPO. J.A. 361-62 (Sullivan Supp. Affidavit).

INPO voluntarily delivers SEE-IN reports to the NRC pursuant to a written agreement that the NRC will hold these reports in confidence. J.A. 151, 237-42 (Howard Affidavit); J.A. 103, 121-29 (Declaration of Joseph Felton, Director of Rules and Records, NRC). The agreement

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[3] Citations to "Pet. App." refer to the Appendix to the Petition for Writ of Certiorari.

further states that the NRC does not take regulatory action against INPO's Members or their employees based solely on information the NRC learns through SEE-IN reports. *Id.* at 361-62 (Sullivan Supp. Affidavit). INPO has repeatedly stated in the course of this litigation, both directly and through its counsel, that, in the event the NRC is obligated to disclose the SEE-IN reports at issue here, INPO would no longer deliver these reports to the NRC and would vigorously resist any attempt by the NRC to obtain these reports. J.A. 282-83 (Sullivan Affidavit); Brief of Appellee INPO at 18-19 (D.C. Cir., Feb. 8, 1991).

In its Petition, Critical Mass implies that SEE-IN is a response to the NRC's Three Mile Island Action Plan, and that "it would be prohibitively expensive for every nuclear plant to develop its own procedures for monitoring all safety information in the industry." Petition 3. There is nothing in the record to support these claims, and Critical Mass provides no citation to the record. It should be noted that SEE-IN was started as an industry-wide initiative well before the NRC adopted the Three Mile Island Action Plan. J.A. 184 (Howard Affidavit); 48 Fed. Reg. 33858 (July 26, 1983). Critical Mass also states that the NRC uses INPO's SEE-IN reports to "make sure that licensees are in fact making their employees aware of new safety information," Petition 3, and "to verify the completeness and accuracy of the descriptions of safety-related 'events' at nuclear power plants in the publicly disclosed [Licensee Event Reports]." *Id.* at 21. Again, there is nothing in the record to support these claims, and Critical Mass provides no citation to the record. Although most events discussed in SEE-IN reports have already been the subject of Licensee Event Reports, J.A. 281-82 (Sullivan Affidavit), there are relatively few SEE-IN reports compared to a large number of Licensee Event Reports. (The ratio is on the order of one SEE-IN report to 150 Licensee Event Reports.) Thus, even if they were used as Critical Mass claims,

SEE-IN reports could not provide a reliable check on more than a small percentage of Licensee Event Reports.

3. *The FOIA Request And The NRC's Response*

In 1984, Critical Mass submitted a request to the NRC under the Freedom of Information Act, 5 U.S.C.A. sec. 552 (West 1977), seeking release of "any and all documents received by [the NRC] from the Institute of Nuclear Power Operations." J.A. 104, 130-33 (Felton Declaration). During the next few months, the NRC released to Critical Mass many INPO documents and correspondence. *Id.* at 104. The NRC sought the views of INPO prior to the release of these documents and INPO reluctantly agreed to the release of these documents. *Id.* at 237-42 (Howard Affidavit).

The NRC, however, refused to release any INPO SEE-IN reports on the ground that these "documents, in whole or in part, contain[] confidential business (proprietary) information." J.A. 104 (Felton Declaration) (citing 5 U.S.C. sec. 552(b)(4) ("Exemption 4")). The reports withheld by the NRC are 270 SERs from the years 1981 through 1983, and 47 SOERs from the years 1980 through 1983. (The NRC also withheld 56 Operations & Maintenance Reminders, which are another type of SEE-IN report.) *See* Felton Declaration, Exhibit H. It is these reports that are at issue in this case.

4. *The Holdings In* Critical Mass I

Critical Mass filed this lawsuit in 1984. (INPO did not become a party until 1988.) The district court (Thomas Penfield Jackson, J.) granted summary judgment in favor of the NRC. The district court found that the SEE-IN reports were confidential commercial information and hence exempt from disclosure under Exemption 4. Pet. App. 38a ("[T]he INPO reports must be deemed to be 'commercial' information in all relevant senses of the word.") The court's ruling was made under

the "likely impairment" prong of *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

On appeal, a divided panel of the D.C. Circuit in *Critical Mass I* affirmed on two important points: First, it held that the SEE-IN reports were "commercial . . . information" within the meaning of Exemption 4. Pet. App. at 46a. Second, it held that the SEE-IN reports were "confidential" since they "would customarily not be released to the public by the person from whom [they were] obtained." *Id.* at 47a-48a.

The court, however, remanded on the "likely impairment" prong of National Parks. It held that the NRC must provide a "detailed justification" for the conclusion that obtaining the SEE-IN reports by some means other than voluntary submission by INPO would entail a significant risk that the value of the submitted reports would decrease. *Id.* at 54a. It also required that the decrease in the value of the reports must be "significant enough to justify withholding the information." *Id.* at 57a.

Judge Buckley concurred in the panel's holdings that the SEE-IN reports were commercial information, and that these reports were confidential, but he dissented from the remand. He would have held that the "likely impairment" prong of *National Parks* was inapplicable to information that is voluntarily submitted to the Government, and therefore that the SEE-IN reports should be within the scope of Exemption 4. *Id.* at 62a-64a.

5. *The Evidence On Remand From* Critical Mass I

Because *Critical Mass I* appeared to raise complex evidentiary issues, INPO reluctantly came to the conclusion that it must intervene in this lawsuit. (As noted above, INPO does not engage in any public activities to promote commercial nuclear power.) The district court granted INPO's motion to intervene in September 1988. J.A. 6.

At Critical Mass' request, INPO made one of its Vice Presidents, Terence J. Sullivan, available for a deposition in Washington, D.C. Dr. Sullivan, who has been employed by INPO since 1982, holds a doctorate in nuclear engineering and has extensive experience in commercial nuclear power plants. J.A. 277-78 (Sullivan Affidavit). Counsel for Critical Mass cross-examined Dr. Sullivan for longer than three hours. F.J.A. 380, 534.[4]

All parties filed cross-motions for summary judgment. INPO supported its motion with five affidavits from witnesses the district court characterized as "highly qualified." Pet. App. 68a. INPO's affidavits were from the following experts:

A. R. P. McDonald, an experienced nuclear utility manager. J.A. 267. Mr. McDonald assisted in designing the SEE-IN program. Based on his experience working in commercial nuclear power plants, he expressed the opinion that public disclosure of the SEE-IN reports at issue here would decrease the quality of the interactions between INPO and nuclear plant personnel.

B. Adm. Donald D. Engen, a former Administrator of the Federal Aviation Administration. F.J.A. 188. Adm. Engen expressed the opinion, based on his experience with aviation safety, that confidentiality contributes to fuller safety reporting. He applied this opinion to the SEE-IN reports at issue here, with the conclusion that disclosure of the reports would hinder the flow of information to INPO.

C. Charles O. Miller, a recognized expert in industrial safety. F.J.A. 273. Mr. Miller stated that preserving the confidentiality of the SEE-IN reports at issue here was consistent with established principles of industrial psychology.

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[4] Citations to "F.J.A." refer to the Joint Appendix in *Critical Mass II*, which was filed in the Court of Appeals on January 24, 1991.

D. Dr. Sullivan, Vice President of INPO. J.A. 277 and 357. Dr. Sullivan stated that INPO, in preparing SEE-IN reports, relied on the subjective perspectives and self-criticism of nuclear plant employees, and he offered concrete examples of this reliance. *Id.* at 363-66. Based on his experience working in commercial nuclear power plants, he expressed the opinion that public disclosure of the SEE-IN reports at issue here would discourage those employees from offering their subjective views to INPO, which in turn would hinder INPO in its analysis.

E. Ms. Howard, Vice President of INPO. J.A. 147. Ms. Howard, who has been employed by INPO since 1980 and who has extensive experience in the commercial nuclear power industry, is responsible for controlling the distribution of SEE-IN reports. She describes the formal, written INPO policy designed to preserve the confidentiality of SEE-IN reports.

Critical Mass claims that INPO "never submitted" evidence from nuclear plant employees. Petition 7. This is incorrect. Mr. McDonald has worked in commercial nuclear plants for years, J.A. 268, and Dr. Sullivan has extensive experience working in commercial nuclear plants. J.A. 278.

As the district court stated, Critical Mass "offer[ed] no affirmative evidence of its own to contradict defendants' declarants and affiants." Pet. App. 69a. In particular, Critical Mass, having cross-examined Dr. Sullivan of INPO, then never relied on his testimony. Critical Mass did submit two affidavits, Affidavit of Michael Mariotte (Dec. 22, 1988) ("Mariotte Affidavit") and Affidavit of Kenneth Boley (Dec. 22, 1988) ("Boley Affidavit"), which total less than three pages, but neither of these affidavits controverts the evidence submitted by INPO in support of its motion. So far as the affidavits reveal, neither of Critical Mass' affiants has any training, experi-

ence, or education in the field of commercial nuclear power.

In its Petition, Critical Mass claims that Licensee Event Reports, which the NRC requires licensees to submit pursuant to a detailed regulation, and which are generally available to the public, "will inevitably become more and more sketchy, revealing less to the public about the important issue of safety at nuclear power plants." Petition 21. There is no support in the record for this claim, and Critical Mass does not provide any citation to the record. Moreover, the NRC regulations governing Licensee Event Reports set forth with detail the required contents of each report, and specifically provide that the report must include a "clear, specific, narrative description of what occurred," as well as a description of the cause of the error or failure, and of "any corrective actions planned as a result of the event." 10 C.F.R. sec. 50.73(b) (1992). The regulations further allow the NRC to require submission of supplemental information if necessary for the agency's "complete understanding" of the event at issue. *Id.* sec. 50.73(c).

It is important to note that, in the district court after remand from *Critical Mass I*, Critical Mass had a full and fair opportunity to develop a record in support of its position. Indeed, INPO, pursuant to a protective order, permitted counsel for Critical Mass to have access to selected SEE-IN reports for the purpose of testing INPO's contentions. J.A. 358-66 (Sullivan Supp. Affidavit).

6. Critical Mass II *And The* En Banc *Decision*

Critical Mass appealed. INPO argued to the panel, *inter alia*, that the "likely impairment" prong of *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), should be rejected in favor of a "plain meaning" interpretation of Exemption 4, relying on this Court's decisions in such cases as *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837

(1984), and *Adams Fruit Co. v. Barrett*, 110 S. Ct. 1384, 1387 (1990). Brief of Appellee INPO at 21-23 (D.C. Cir., Feb. 8, 1991). INPO emphasized that the SEE-IN reports were provided voluntarily to the NRC. *Id.* at 12-13.

The panel in *Critical Mass II* reversed and remanded. Pet. App. 87a. It held that summary judgment was inappropriate because INPO and the NRC failed to meet the "likely impairment" test to the panel's satisfaction, although the articulation of that test in *Critical Mass II* differed in significant respects from that given in *Critical Mass I*. Judge Randolph, joined by Judge Williams, concurred. Judge Randolph questioned the statutory basis of the "likely impairment" test, but he recognized that the panel could not overrule *National Parks*. Pet. App. 88a-89a.

INPO and the NRC suggested rehearing *en banc*, which the court granted and vacated the panel decision in *Critical Mass II*. On rehearing *en banc*, INPO again emphasized that the SEE-IN reports were submitted to the NRC voluntarily. *En Banc* Brief of Appellee INPO at 21 (D.C. Cir., Nov. 13, 1991).

The court *en banc*, in an opinion written by Judge Buckley, adopted the reasoning of Judge Buckley's concurring and dissenting opinion in *Critical Mass I*, written five years earlier. The court found that the SEE-IN reports were commercial information that INPO treated as "confidential" in the sense that INPO did not "customarily" release these reports to the public. The court held that the reports were within Exemption 4 because they were submitted on a voluntary basis, and it confined the "likely impairment" test of *National Parks* to situations where (as in *National Parks* itself) the information was required to be submitted to the Government. Pet. App. 18a. Judge Buckley was careful to note that "we do not repudiate any part of our holding" in *National*

Parks. *Id.* Furthermore, he stated that "we know of no case considered by this court in the past, other than *Critical Mass I* and *II*, that would have been decided differently had this test been applied." *Id.*

Judge Randolph, joined by Judges Silberman and Sentelle, concurred to explain that respect for *stare decisis* precluded an outright rejection of *National Parks*. Judge Ruth Bader Ginsburg, joined by Chief Judge Mikva and Judges Wald and Edwards, dissented. Judge Ginsburg would have applied the "likely impairment" test of *National Parks* to information voluntarily submitted to the Government.

SUMMARY OF THE REASONS FOR DENYING THE WRIT

A. No other circuit, as of the date of this Brief, has had an opportunity to consider the decision below. The D.C. Circuit did not repudiate any aspect of *National Parks*. The question Critical Mass seeks to raise is fact-bound. Critical Mass points to a single decision by another circuit that it claims *might* have been decided differently under the *en banc* decision below.

B. The focus of Petitioner's argument is a "parade of horribles" that, according to Petitioner, is likely to follow the decision below. Even if Petitioner's predictions were reasonable, which they are not, this Court should first allow these questions to percolate in the lower federal courts. If Petitioner's parade actually happens, then this Court could review an appropriate case arising on actual, rather than predicted, facts.

C. The Exemption 4 issue here is tied together with a complex summary judgment issue under Fed. R. Civ. P. 56, as interpreted by this Court in *Celotex*. Summary judgment was appropriate because Petitioner submitted no evidence to controvert the extensive record marshalled by Respondents. The question raised by the lopsided

record would preclude this Court from considering the Exemption 4 issue in a clean, stand-alone context.

REASONS FOR DENYING THE WRIT

A. As of the date of this Brief in Opposition (February 19, 1993), counsel for Respondent INPO knows of no case decided by any Circuit that considers the *en banc* decision below.

The D.C. Circuit, *en banc*, held that "financial or commercial information provided to the Government on a voluntary basis is 'confidential' for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained." Pet. App. 18a. Judge Buckley, writing for the majority below, stated that "we know of no case considered by this court in the past, other than *Critical Mass I* and *II*, that would have been decided differently had this test been applied." *Id.*

Judge Ruth Bader Ginsburg, in a dissent joined by Judges Wald, Mikva, and Edwards, noted that "[t]he fact is, we have had *rather few cases* concerning voluntarily submitted information." *Id.* 29a n.4 (emphasis added). Although Judge Ginsburg went on to predict more cases involving voluntarily submitted information, *id.*, the unusual issue of voluntarily submitted information is surely *not* "an important question of federal law [that should be settled] by this Court." Rules of the U.S. Supreme Court 10.1(c).

Judge Buckley, writing for the majority below, made clear that "in defining the limits of the *National Parks* confidentiality test, we do not repudiate any part of our holding in that case." Pet. App. 18a. Thus, to the extent Critical Mass suggests the D.C. Circuit *en banc* has overruled *National Parks*, it is in error. *See* Petition 13, 19. Because *National Parks* involved information that private parties were *required* to submit to the Government, that

case was not, and could not be, dispositive with respect to information submitted voluntarily. The real issue is whether *National Parks* should be extended to apply to information that is submitted to the Government voluntarily, as in this case.

Critical Mass admits, as it must, that under *National Parks* "it was *well established* that if the Government had no ability to compel submission of necessary information, or if the process of compelling it would be overly burdensome, then the information would be exempt from disclosure." Petition 18-19 (emphasis added). Thus, Critical Mass accepts that the voluntary character of a submission should often be *dispositive* of the question of disclosure under Exemption 4. The *en banc* decision below is entirely consistent with this "well established" principle.

Critical Mass has struggled since the start of this protracted lawsuit to show that the NRC supposedly had the statutory authority to obtain the reports from INPO's members, and therefore INPO's submission of the reports to the NRC could not be voluntary. Only one other case, *Teich v. FDA*, 751 F. Supp. 243 (D.D.C. 1990), *appeal dismissed by agreement*, No. 91-5023 (D.C. Cir. July 2, 1992),[5] appears to have raised an analogous issue, and, just as here, this issue in *Teich* was highly fact-bound. (Although Critical Mass cites a second district court decision, *Comstock Int'l (U.S.A.), Inc. v. Export-Import Bank of the United States*, 464 F. Supp. 804, 808-09 (D.D.C. 1979), Petition 18, the information at issue there was "required as a general practice" by the agency, and so *Comstock* is a different case.)

Critical Mass points to only a single circuit court decision that it claims *might* have been decided differently

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[5] The suggestion in the dissenting opinion below that the *National Parks* test may have discouraged defendants in *Teich* from taking an appeal, Pet. App. 29a n.4, is in error, since defendants did appeal, although the case later became moot.

under the *en banc* decision below: *9 to 5 Organization for Women Office Workers v. Board of Governors of the Federal Reserve System*, 721 F.2d 1 (1st Cir. 1983). Petition 14. There the First Circuit refused to affirm summary judgment in favor of the Federal Reserve even though that agency had no authority to compel the private parties to provide the information. *9 to 5*, however, was plainly wrong in Critical Mass' view, because Critical Mass asserts that it is "well established" that information is exempt where the agency "had no ability to compel submission" of the information. Petition 18-19. Thus, according to Critical Mass, the information in *9 to 5* should have been exempt from disclosure under Exemption 4. Apparently, Critical Mass believes there is a conflict between the *en banc* decision below and *9 to 5* but neither was correctly decided.

This case presents a rare and fact-bound issue that has little significance for federal law. Since there is no conflict among the circuit courts, this issue should not now be reviewed by this Court.

B. Critical Mass argues that this case warrants review because the ruling below, Critical Mass claims, will be difficult to apply and will encourage Government agencies to avoid disclosure of information obtained from private parties. Petition 14-22. This is a classic "parade of horribles" argument, which is unpersuasive. INPO denies that any of Critical Mass' horribles will come to pass, but this Court will still be sitting if they do.

Critical Mass predicts that the rule adopted below will "create the greatest confusion in the area of government contracts," Petition 16, but that prediction certainly counsels *against* reviewing this case, which arises in the context of the regulation of commercial nuclear power. Even if Critical Mass were right in predicting confusion, which it is not, the best course is to allow this issue to percolate in the lower federal courts before this Court takes it under consideration.

While Critical Mass claims that the rule adopted by the *en banc* court below is unworkable, it nowhere mentions the near impossibility of understanding or applying the "likely impairment" test of *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). That test calls for the defendant to provide a "detailed justification," *Pacific Architects & Engineers v. Renegotiation Board*, 505 F.2d 383, 385 (D.C. Cir. 1974), showing that in the future, under facts different from those existing at present, the information available to the Government would suffer a "significant impairment." This test is so open-textured that neither the parties nor the district court can have any reasonable sense of what evidence can satisfy this test. Indeed, the only thing that can be said in favor of the "likely impairment" test is that cases calling for its application arise infrequently. Certainly the criteria of clarity and ease of application do not *favor* the "likely impairment" test over the rule adopted by the *en banc* court below.

Critical Mass also claims that Government agencies will be encouraged to "act in conflict with the objectives of the FOIA . . . by agreeing to accept information on a 'voluntary' basis." Petition 20. Critical Mass, of course, cannot suggest that the *National Parks* test has any footing in the statutory language of Exemption 4—as Judge Randolph suggested in his concurring opinion in *Critical Mass II*, this test was made "out of whole cloth." Pet. App. 88a. Since the decision by the *en banc* court below certainly respects the statutory language to a greater degree than does *National Parks*, it would be peculiar if *National Parks* did a better job of following the "objectives" of the FOIA.

Critical Mass' "parade of horribles" argument does not justify granting the writ of certiorari.

C. This case raises a difficult and fact-bound issue under Fed. R. Civ. P. 56 in light of this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). If this

Court granted certiorari, and reached any result other than to affirm the judgment below, this summary judgment issue would have to be decided either by this Court or by the court below on remand. The presence of this summary judgment issue makes this case an inappropriate vehicle for review by this Court.

On remand from *Critical Mass I*, the district court decided this case on cross-motions for summary judgment. INPO and the NRC submitted extensive affidavits from witnesses the district court characterized as "highly qualified nuclear professionals possessing both years of relevant experience and the responsibility of currently relevant office." Pet. App. 68a. At Critical Mass' request, INPO made its Vice President, Terence J. Sullivan, available for a sworn deposition in which counsel for Critical Mass cross-examined him for longer than three hours. F.J.A. 380, 535. (Dr. Sullivan, who has been employed by INPO since 1982, holds a doctorate in nuclear engineering and has extensive experience in commercial nuclear power plants. J.A. 277-78.) INPO, in support of its motion for summary judgment, relied heavily upon the transcript of Dr. Sullivan's deposition. Statement of Material Facts in Support of Motion for Summary Judgment of INPO (D.D.C. Oct. 18, 1988).

In contrast to the evidence marshalled by INPO and the NRC, Critical Mass, as the district court stated, "offer[ed] no affirmative evidence of its own to contradict defendants' declarants and affiants." Pet. App. 69a. Having cross-examined Dr. Sullivan under oath, Critical Mass then never relied on any of his testimony. The sum of all Critical Mass' evidence was two affidavits, which together are less than three pages in length. Mariotte Affidavit; Boley Affidavit. So far as is revealed in the affidavits, neither of the affiants for Critical Mass appear to possess any qualifications, training, or experience in the nuclear field. Most important, neither of the affiants for Critical Mass controverted any of the extensive evidence presented by INPO and the NRC.

In light of this lopsided record, INPO argued to the panel in *Critical Mass II*, Brief of Appellee INPO at 17, 23 (D.C. Cir., Feb. 8, 1991), and then to the *en banc* court on rehearing, *En Banc* Brief of Appellee INPO at 10 (D.C. Cir., Nov. 13, 1991), and *En Banc* Reply Brief of Appellee INPO at 6-7 (D.C. Cir., Dec. 30, 1991), that summary judgment for INPO and the NRC was appropriate under Fed. R. Civ. P. 56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth *specific facts showing that there is a genuine issue for trial.*

(emphasis added).

Critical Mass failed to "set forth specific facts" to controvert the evidence supporting the motions by INPO and the NRC, and therefore summary judgment was wholly appropriate even under the legal standard adopted in *Critical Mass I*. As this Court stated in *Celotex*, a party cannot "resist a properly made motion by reference only to its pleadings," 477 U.S. at 325, yet that is effectively what Critical Mass did in the district court here.

Of course, a motion for summary judgment "implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Here the NRC bears the burden of proof, but that burden should not be interpreted "so as effectively to preclude any possibility of summary judgment." *Chagnon v. Bell*, 642 F.2d 1248, 1265 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 911 (1981). *See Formaldehyde Inst. v. HHS*, 889 F.2d 1118, 1125 (D.C. Cir. 1989) (uncontested affidavit from agency employee warranted summary judgment); *Goldberg v. United States Dep't of State*, 818 F.2d 71 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 904 (1988).

Once INPO and the NRC came forward with their extensive, detailed evidence, Critical Mass could not merely sit on its hands and still win. It was obligated under *Celotex* to controvert the opposing parties' evidence with evidence of its own. This it failed to do. As a result, the judgment of the *en banc* court below, which affirmed the summary judgment entered by the district court, is correct without regard to the question presented in Critical Mass' Petition.

INPO submits that this procedural issue makes this case unsuited for review by this Court. Presumably, this Court, in the event it granted certiorari and then reversed the judgment below, would remand to the D.C. Circuit for further consideration of the Rule 56 issue, which was not addressed by either the panel in *Critical Mass II* or by the court *en banc*. In that event, this Court's decision would not conclude this protracted lawsuit, which might thus limp forward into its second decade.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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